Report

On

The Health Information Protection Act
Draft Regulations

September 10, 2004

Saskatchewan Information and Privacy Commissioner

100 – 1230 Blackfoot Drive
Regina, Saskatchewan S4S 7G4

Tel: (306) 787-8350
Fax: (306) 798-1603
www.oipc.sk.ca

Response to *The Health Information Protection Act Regulations – DRAFT for Consultation*

Introduction

On August 11, 2004 our office received from Saskatchewan Health a set of proposed regulations under *The Health Information Protection Act* (HIPA)[1]. Saskatchewan Health has requested our comments on the proposed regulations.

In addition, our office has a statutory mandate to provide advice and commentary on proposed legislation. Section 52 provides in part as follows:

> *52. The Commissioner may: (a) offer comment on the implications for personal health information of proposed legislative schemes or programs of trustees; ...*"

Our office is pleased to see the publication of the draft regulations. In our Annual Report for 2003-2004 we expressed a concern that the absence of regulations was creating problems for trustees and compromising full compliance by trustees with HIPA.[2]

We applaud the initiative of the Department to publish the draft regulations on its website and to provide an opportunity for public input. HIPA and any subordinate legislation such as these regulations impact the personal health information of all Saskatchewan residents. For many, no other type of personal information is as sensitive and as prejudicial as information about our health and diagnosis, treatment and care. For these reasons, the publication of the draft regulations is a very positive development.

Overview

Our perspective is that when considering any health information legislation we must consider what the impact will or may be on the people of Saskatchewan. How will the proposed regulations impact the confidence that provincial residents need to have when they interact with health care providers? We believe it is fundamentally important that citizens have confidence that their privacy will be protected and that their personal health information will be treated carefully and respectfully by health information trustees.

Many of the proposed regulations would sanction disclosures of personal health information without consent.

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[1] S.S. 1999, c. H-0.021

[2] Available online at www.oipc.sk.ca under Annual Reports, page 15

Section 5 of HIPA provides as follows:

> *5(1) Subject to subsection (2), an individual has the right to consent to the use or disclosure of personal health information about himself or herself.*
>
> *(2) A trustee shall use or disclose personal health information about an individual only:*
>
> *(a) with the consent of the subject individual; or*
> *(b) in accordance with a provision of this Act that authorizes the use or disclosure.*

We note that the "right to consent" described in section 5 of HIPA is already circumscribed by more than 20 different provisions which allow disclosure of personal health information without consent. In considering proposed Regulations # 4,5,6, 7 and 8, our view is that the threshold for expanding that list of disclosures without consent should require more rigour.

In several cases we have recommended that Privacy Impact Assessments ("PIA") be done before certain proposed regulations be resolved. A PIA is a self-audit tool in the form of a questionnaire. It canvasses an organization's general privacy regime as well as how personal information is collected, used, disclosed, accessed and corrected. The PIA also addresses questions of security and destruction of records. A form of PIA is available on our website, www.oipc.sk.ca.

We note that PIAs are statutorily prescribed in Alberta where a custodian has the following obligation:

> *s. 64(1) Each custodian must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual who is the subject of the information.*
>
> *(2) The custodian must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).*

The Ontario legislation does not explicitly require PIAs but does require that the Information and Privacy Commissioner must be consulted by the Minister of Health and Long Term Care and approve a number of different types of disclosures.[3]

Although HIPA does not require PIAs we believe that this is an appropriate measure that Saskatchewan Health should undertake prior to enacting legislation that expands the permitted disclosures of personal health information without consent.

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[3] S. 45

We have compared the proposed regulations with the provisions in the only other Canadian jurisdictions with a stand-alone health information law namely, Manitoba, Alberta and Ontario.[4] The Ontario law is scheduled to go into force November 1, 2004. Draft regulations for that law are available for public comment.[5]

In the Ontario and Alberta legislation, a "custodian" is equivalent to a "trustee" as described in Saskatchewan and Manitoba legislation although there are some differences in the list of bodies that qualify for that designation.

Proposed Regulation #1 raises the very important question of the scope of HIPA. Since our office was not engaged in the development of HIPA we take this opportunity to offer comments on the specific regulation and also the related larger question of the purpose of the legislation.

Proposed Regulation #2 addresses an item of particular importance to trustees attempting to meet the requirements of HIPA.

Proposed Regulations #3 and 4 are appropriate but we have suggested modifications.

This office is opposed to proposed Regulation #5.

We recommend that Privacy Impact Assessments should be undertaken and reviewed by our office before enactment of proposed Regulations #6 and 8.

We are unclear as to the need for proposed Regulation #7

We have suggested modification of proposed Regulation #9.

With proposed Regulation #10, we suggest that since it does not concern personal health information it ought to be enacted as a regulation or statutory amendment to a law that specifically regulates health professionals. We do not think it is appropriate as an amendment to a law that deals exclusively with personal health information and privacy issues.

With respect to proposed Regulation #11 we have a clear preference for Option Two.

HIPA does not expressly mandate a review of this relatively complicated law after some fixed period of time. That is a common feature of the health information laws in Manitoba, Alberta and Ontario.[6] In the absence of such a review procedure, we have offered some comments that relate more to the statute than the regulations. We have

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[4] The applicable statutes are Manitoba's Personal Health Information Act, S.M. 1997, c. 51 ("PHIA"), Alberta's Health Information Act, R.S.A. 2000, c. H-5 ("HIA") and Ontario Bill 31, Personal Health Information Protection Act, 2004

[5] Available online at http://www.health.ov.on.ca/english/public/updates/archives/hu_03/priv_legislation/proposed_regulations.html

[6] Ontario s. 73; Alberta s. 109; Manitoba s. 67

done this since the statute and the regulations must operate together and they do constitute the foundation for Saskatchewan's health information regime.

Proposed Regulation #1

Exempting the Saskatchewan Archives Board from the rules of HIPA where the personal health information collected by the Saskatchewan Archives Board is not from a prescribed trustee under HIPA, where records have been publicly available through the Archives, etc.

Our Commentary

This regulation attempts to partially redress what we regard as a difficulty with HIPA. HIPA classifies every body that is a "government institution" within the meaning of *The Freedom of Information and Protection of Privacy Act* as a "trustee" even though virtually none of these government institutions are in the business of delivering health services. For example, our office recently addressed the obligations of Saskatchewan Government Insurance in Report H 2004-001[7].

Like the Saskatchewan Archives Board, many government institutions may currently collect, use or disclose personal health information but typically this relates to employee health information or information incidental to other types of personal information collected, used or disclosed by that organization.

HIPA is not a typical privacy law such as one finds in Part IV of *The Freedom of Information and Protection of Privacy Act* or Part IV of *The Local Authority Freedom of Information and Protection of Privacy Act.*

HIPA, like its counterparts in Manitoba, Alberta and Ontario, has been carefully designed to facilitate existing information sharing practices among traditional providers in the health care sphere. All four laws have been developed to accommodate the transition to electronic health records. This has meant that express consent is not required for most usual kinds of collection, use or disclosure among health information trustees. HIPA was designed to reflect the historic and important role assigned by health provider training and ethical standards to issues of privacy and confidentiality. In other words, there is a pre-existing culture of privacy sensitivity that pervades hospitals, clinics and other health care settings.

Most government institutions have not operated within that same culture. Their involvement with health information has been quite limited. Under the FOIP Act those government institutions have quite broad powers to use personal information but are limited in disclosing such information to other organizations without written consent. In our view, it is not prudent to permit more than 70 different government institutions including such diverse organizations as Saskatchewan Telecommunications, the Milk

[7] Available online at www.oipc.sk.ca under Reports, [25] to [28]

Control Board, the Law Reform Commission and the Wascana Centre Authority, a relaxed opportunity to use or disclose personal health information without consent.

I am mindful that there are other restrictions in HIPA that would limit disclosure on a 'need-to-know" basis but in a practical sense it is largely up to trustees to police themselves. Our office, with only three staff, simply does not have the resources to adequately monitor the activities of the many thousands of health information trustees in Saskatchewan. We can and will respond to complaints and queries but are not currently in a position to audit the need-to-know disclosure rules for all physicians' clinics, laboratories, acute and long term care facilities and for all members of more than a dozen different health professions and disciplines plus more than 70 government institutions including very large Crown Corporations.

I suggest that there are practical reasons why it may be advantageous for the list of trustees to exclude government institutions other than the Department of Health. All of those other government institutions will remain subject to the FOIP Act and more particularly Part IV of that Act. If the FOIP Act is amended as our office suggested in our Annual Report to impose an express duty to protect personal information and safeguard that information, then there should be no privacy protection gap.[8]

Making all government institutions subject to HIPA as well as the FOIP Act imposes a considerable administrative burden on those organizations. Not only must they ensure that they scrupulously follow Part IV of the FOIP Act, but they are also required to train staff to a comfortable understanding of HIPA. In addition, since September 2003 those government institutions that are part of Executive Government are required to also adhere to the Privacy Framework for Executive Government. Our office is concerned that overly complex and conflicting rules for the protection of personal information may frustrate and overtax the normal capacity of these organizations. The result may be diminished privacy protection.

Also, failure to prune the list of trustees in this suggested fashion will likely lead to many future requests from different government institutions for some kind of carve out.

We are mindful that Manitoba in its *Personal Health Information Act* has an expansive definition of "trustee" that is similar to Saskatchewan although it is even broader and includes local government bodies. We do not know at this time whether the 5 year statutorily mandated review of that law will change the scope of PHIA.

In Ontario and Alberta, the only government department classified as a trustee is the Department of Health and Long Term Care (Ont.) and the Department of Health and Wellness (Alta.) This leaves other government departments and bodies in Ontario and Alberta subject only to the *Freedom of Information and Protection of Privacy Acts* in those two jurisdictions.

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[8] Page 21

Proposed Regulation #2

Retention of records containing personal health information

Commentary

This proposed Regulation would set out definitions for transitory records, secondary records and scheduling records and then fix a minimum retention period for those classes of records.

This provision is important for trustees that are required to comply with section 16 of HIPA. That section provides as follows:

> *16 Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:*
>
> *(a) protect the integrity, accuracy and confidentiality of the information;*
>
> *(b) protect against any reasonably anticipated:*
>
> *(i) threat or hazard to the security or integrity of the information;*
>
> *(ii) loss of the information; or*
>
> *(iii) unauthorized access to or use, disclosure or modification of the information; and*
>
> *(c) otherwise ensure compliance with this Act by its employees.*

Scheduling records is reasonable however it should be made clear that if the scheduling records include diagnostic, treatment and care information or health history of a patient, the particular record will not be classified as a scheduling record and subject to early destruction.

We understand that the common retention period in government is six years. We expect that was influenced to a large extent by the typical six year limitation period in the *Limitation of Actions Act*. We note however that *Bill 51, The Limitations Act*, received Royal Assent on June 10, 2004. Since the applicable limitation period is always an important consideration in determining the appropriate record retention period, it will be important to consider what changes that would require in this regulation. The adoption of the 'discovery plus 2 year rule' and the 15 year outside limit by the Legislative Assembly must be addressed in the determination of what retention period is appropriate.

Our office has recommended that when a public body uses or discloses personal information and makes a decision based on that information, the information ought to be retained for at least one year to allow an access request by the individual[9]. We therefore recommend that this requirement be accommodated in this Regulation.

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[9] Report # LA 2004-001, [54], available online at www.oipc.sk.ca under Reviews

Proposed Regulation #3

Designation of appropriate archives

Commentary

We think this regulation is appropriate.

It has come to our attention that retiring physicians have delivered boxes of patient records to their local regional health authority without seeking prior consent from the authority. It will be important to ensure that regulations and codes of ethics for health service providers ensure that a trustee remains a "trustee" in respect of personal health information of patient unless and until a properly designated archive accepts responsibility for those records. Physical delivery of patient records to a regional health authority should not in and of itself operate to relieve the trustee of its obligations under HIPA.

It may be helpful to codify that requirement in this regulation.

Proposed Regulation #4

Disclosure of personal health information without consent for the purpose of professional disciplinary hearings.

The need for professional regulatory bodies to enforce their ethical standards and codes of practice is imperative. The proposed regulation enables the disclosure of personal health information for that purpose.

We suggest however that, absent the express consent of the individual patient, the identity of the patient should be masked in any disciplinary proceedings that may be accessible to the public. Otherwise there is the risk that an individual may have a great deal of their personal health history disclosed to "the world" simply because they happened to be the particular patient when their health care professional is alleged to have done something unprofessional.

At the very least, before this regulation goes into force steps should be taken by the Department of Health to ensure that all Saskatchewan health profession regulatory bodies have internal policies to mask the identity of the patient. We note that (1)(a)(iii) does not go as far as our recommendation.

We note that in Alberta's HIA, section 35(4) provides that

> *(4) A custodian may disclose individually identifying diagnostic, treatment and care information to a health professional body for the purpose of an investigation, a discipline proceeding, a practice review or an inspection if*

(a) the custodian has complied with any other enactment authorizing or requiring the custodian to disclose that information for that purpose; and (b) the health professional body agrees in writing (i) not to disclose the information to any other person except as authorized by or under the Act governing the health professional body, and (ii) to destroy the information.

The proposed Regulation (1)(a)(iii) is unhelpful as to what should be covered by the "*written policy concerning the disclosure of personal health information*". It should either be replaced or supplemented with direction as to how the privacy of individuals will be protected when personal health information is disclosed in a hearing. This would include the masking of the identity of an individual, the safeguarding of personal health information by the regulatory body and the appropriate and timely destruction of that personal health information at the earliest possible opportunity.

Proposed Regulation #5

Disclosure of personal information without consent regarding condition reports of individuals by a trustee.

Commentary

We are opposed to this regulation. This is clearly a disclosure for a secondary purpose that has nothing to do with the diagnosis, treatment or care of a particular patient. We do not think that seeking consent is impractical or unreasonable if a media request is received by a trustee. The suggestion that this would be used "*only when the trustee believes it is necessary or is important to do so*" is disappointing. On what possible basis would we think that the trustee is more appropriate than the individual to make a decision about broadcasting that individual's personal health information? This assertion is paternalistic and disturbing.

We are concerned with the suggestion that since this is "*current practice in many institutions*" it should be codified in the regulations to HIPA. We do not view this as good enough. One could probably find a number of privacy invasive practices that exist in one or more trustee organizations. This is an excellent opportunity to 'raise the bar' and to eliminate past practices that do not meet contemporary legislated privacy standards.

It is presumptuous to assume that the conditions from *The Canadian Press Stylebook* would not be invasive of an individual's privacy. For some individuals, just the fact that they are a patient of an acute care facility might be particularly sensitive information they would not wish disclosed to anyone. Next of kin may be anxious to notify all family members of a traffic accident injury before they hear it on television, radio or the Internet. Just a suggestion that a business leader has gone to hospital because she was experiencing chest pain could, if public, frighten investors or partners and prejudice the

business. For a woman that has entered a hospital for an abortion or a man that attends a laboratory as a semen donor for artificial insemination purposes, any public reference to their attendance at a trustee's facility may cause them discomfort.

We note there already exists authority for disclosure without express consent to next of kin or to someone with whom the subject individual has a close personal relationship. This effectively ensures that next of kin of a patient can be given appropriate information about a patient.

There is already a long list of sanctioned disclosures without the consent of the individual. To add this proposed disclosure would, in our view, devalue the other meritorious exceptions to the consent requirement.

Further, we note that the preamble to the Act includes the following declarations:

> *That personal health information is private and shall be dealt with in a manner that respects the continuing interests of the individuals to whom it relates;*
>
> *That individuals provide personal health information with the expectation of confidentiality and personal privacy;*
>
> *That trustees of personal health information shall protect the confidentiality of the information and the privacy of the individuals to whom it relates;*
>
> *That the primary purpose of the collection, use and disclosure of personal health information is to benefit the individual to whom it relates;*
>
> *That, wherever possible, the collection, use and disclosure of personal health information shall occur with the consent of the individuals to whom it relates*

We submit that this proposed regulation is not consistent with these declarations or with the reasonable expectations of Saskatchewan residents. If there is no explicit consent there should be no disclosure.

Proposed Regulation #6

Disclosure of registration information without consent to the Saskatchewan Cancer Agency

Commentary

Our office is currently reviewing the cervical cancer program operated by the Saskatchewan Cancer Agency. We will address this proposed amendment in our report on that program.

We would expect that planning, delivering, evaluating or monitoring most programs would not normally require identifiable patient information.

It appears that one of the reasons for this proposed regulation is data matching. At the very least the Agency should be required to complete a privacy impact assessment before such a proposed regulation is considered.

Proposed Regulation #7

Disclosure of registration information without consent to ambulance operators for the purpose of obtaining payment for services provided to an individual

Commentary

It is not clear to our office that this is not already permitted by HIPA. Section 28(1) permits disclosure without consent "… (a) to a trustee in connection with the provision of health services by the trustee". The definition of "trustee" includes an operator as defined in *The Ambulance Act.* Can payment for services be considered "in connection with the provision of health services by the trustee"? We note that a similar question is posed in the PIPEDA Awareness Raising Tools (PARTs) Initiative For the Health Sector:

> *22. Is consent implied for the disclosure of personal health information to private insurance companies or third party payers for the purposes of reimbursement of health services rendered?*
>
> *In certain circumstances, yes. In circumstances where the current practice is to obtain written consent by making the patient sign a reimbursement form, the practice should continue. Where no form is signed, implied consent is acceptable provided patients understand that this is happening and have not behaved in a way that may indicate refusal of consent.*[10]

Reasoning by analogy, it seems reasonable to take the view that necessary registration information could be provided without consent to ambulance operators to enable them to recover the cost of service.

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[10] Available online at http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/vwGeneratedINterE/gv00211e.html

Proposed Regulation #8

Disclosure of registration information without consent to the Department of Learning for the purpose of administering the Student Tracking Program.

Commentary

We were surprised and disappointed that Order-in-Council 594/2004 was issued some three weeks before the published deadline for public input on this proposed Regulation #8.

Our office was not consulted on this Order-in-Council. At this time, we are not able to confirm whether due diligence has been done from a privacy perspective. We understand that no privacy impact assessment was undertaken. We further note reference in the Order-in-Council to policies, procedures, and protocol agreements and to disclosure to "approved agencies". We have not seen any of those materials nor have we been provided with a list of approved agencies.

Clearly, it is important to identify children at risk and to promote full attendance in school. From the explanatory notes produced by Saskatchewan Health however it appears that there may be many ways that the registration information can or may be used by the Department of Learning. This appears to include disclosing the information to outside agents. Our view is that some or all of these uses are wholly collateral to the provision of health care services. The material produced by Saskatchewan Health is inadequate to assess whether this proposal is a reasonable balance between privacy interests of students and their families on the one hand and the province's interest in identifying children who may be at risk and allow the targeting of remedial actions.

We recommend that a privacy impact assessment be done by Saskatchewan Learning and Saskatchewan Health of the proposed disclosure of registration information without consent before such a regulation is made.

Proposed Regulation #9

Fees that can be charged for providing access to records containing personal health information.

Commentary

a) Quantum of Fees

This proposed regulation warrants careful examination since access fees tend to be a problematic area for most privacy/access regimes. The basic fees proposed by Saskatchewan Health appear for the most part to be in line with those charged in such provinces as Alberta and Manitoba.

The Manitoba Regulation does not address fees although the enabling legislation authorizes such a fee regulation. The *Personal Health Information Act* provides as follows:

> *10. A trustee may charge a reasonable fee for permitting examination of personal health information and providing a copy, but the fee must not exceed the amount provided for in the regulations.*

On July 3, 2004 Ontario published draft regulations under the *Personal Health Information Protection Act, 2004* but these draft regulations do not address fees. The Act provides as follows:

> *52 (9) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part or provides a copy of it to an individual under clause (l)(a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.*
>
> *(10) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed.*

The Alberta HIA regulation permits a basic fee of $25 for one or more the following steps to produce a copy of the information:

(a) receiving and clarifying the request;
(b) obtaining consent if necessary;
(c) locating and retrieving the records;
(d) preparing the record for copying, including removing staples and paper clips;
(e) preparing a response letter;
(f) packaging copies for shipping or faxing, or both;
(g) postage and faxing costs;
(h) photocopying a record.

In Alberta the photocopy charge is $0.25 per page over and above $5.00. Other charges include $6.75 per ¼ hour for supervision of applicant's examination of original records and for severing time to determine whether a record requires severing. The custodian may charge health services provider time at $45 per ¼ hour to a maximum of 3 hours for "severing time". Also direct costs such as charges "to retrieve records or to return records, or both, from another location" allow the actual cost to the custodian to be charged to the applicant.

We note that there is no ceiling or maximum in the case where a trustee in Saskatchewan "*incurs additional costs in providing access to the records or in providing professional consultation in regard to information contained within the records*". In other words, if a trustee decides to hire a lawyer who charges say $750 for reviewing the patient's file, studying HIPA and providing written advice to the trustee on a "rush" basis, it appears that the applicant could be presented with that bill for $750 plus the fee calculated on the basis of $15 per half-hour by staff of the trustee.

The Department of Health asserts that the proposed Regulation #9 is "*intended to enable the trustee enough flexibility to recover costs associated with providing access while still establishing a ceiling to keep fees reasonable*". The flexibility is apparent from a trustee perspective but the ceiling only appears to relate to the hourly rate charged by the trustee. There is no ceiling in terms of a maximum number of hours as there is in Alberta's HIA.

A genuine ceiling also provides a significant inducement to a trustee to spend some time and effort improving their information management processes. A trustee that does not have good information management will not be able to pass on large costs to an applicant resulting from undue or unreasonable searches for responsive information.

We note that the fee section in HIPA qualifies the fee with the adjective "reasonable". Our office will have the opportunity, over time, to interpret the expression "reasonable fee". In the meantime, we think there is value in giving more direction to trustees as to what is and is not acceptable.

(b) A Fixed Time to Respond

Independent of the quantum of fees, it may be useful to include a 60 day requirement for persons to respond to a fee estimate. In other words, if the applicant does not respond within 60 days after receiving the estimate, the request may be treated by the trustee as abandoned.

(c) Fee Waiver

We note that section 39 of HIPA provides as follows:

> *39. A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.*

The use of the discretionary "may" suggests that a trustee may also choose to charge no fee for access to someone's personal health information.

We suggest that the regulation include an explicit power to waive all or part of the fees.

This could be a provision similar to Alberta Regulation s. 13. That states:

> *For the purposes of section 67(4) of the Act, a custodian may excuse an applicant from paying all or part of a fee if in the opinion of the custodian it is fair to excuse payment.*

The comparable provision in Ontario is:

> *A health information custodian mentioned in subsection (9) may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so.*[11]

Proposed Regulation #10

Preventing the disclosure of provider information by trustees (i.e. pharmacists).

Commentary

We are mindful that section 57 and 63(w) of HIPA provide as follows:

> *57. Where information about a trustee or the activities of a trustee is collected in conjunction with the collection of personal health information and regulations are made pursuant to clause 63(1)(w) governing that information, no person shall use or disclose the information about the trustee or the trustee's activities except in accordance with the regulations.*
>
> *63. (1) For the purpose of carrying out this Act according to its intent, the Lieutenant Governor in Council may make regulations: (w) for the purposes of section 57, governing the use and disclosure of information respecting trustees and their activities.*

We understand that our office was not engaged in discussions with respect to these provisions at the time the bill was under consideration. We do not understand why this provision was included in HIPA.

Our analysis of this proposed regulation is organized around the following questions:

(a) Is the prescribing practices information of a physician "*personal health information*" within the meaning of HIPA?

(b) If not, is the prescribing practices information of a physician "*personal information*" as defined in the federal *Personal Information Protection and Electronic Documents Act* or the Saskatchewan *Freedom of Information and Protection of Privacy Act*?

(c) If neither "*personal health information*" nor "*personal information*", is it appropriate to include such a provision in HIPA?

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[11] Bill 31, s. 52(11)

(a) Is the prescribing practices information of a physician "personal health information" within the meaning of HIPA?

In our view, the answer is NO. HIPA is focused on identifiable personal health information of patients. This focus is underscored by the preamble to the statute. Health provider information is not included in the definition of "*personal health information*" that appears in s.2(m) of HIPA. The definition appears focused on diagnosis, treatment and care information in respect of an identifiable individual.

We understand that at this time Saskatchewan licensed pharmacies or at least some of them sell certain information about the prescribing practices of Saskatchewan physicians. Our understanding is that there are no personal identifiers of patients in the prescribing information sold by Saskatchewan pharmacists.

(b) If not, is the prescribing practices information of a physician "personal information" as defined in the federal *Personal Information Protection and Electronic Documents Act* or the Saskatchewan *Freedom of Information and Protection of Privacy Act*?

It is important to address the question of whether information about the prescribing information of physicians is "*personal information*". We have indicated above that this would not be personal information of patients. Could this be personal information of physicians?

In our view, prescribing practices information of a physician is not the "personal information" of the physician.

We base this opinion on a number of authorities. In terms of the *Personal Information Protection and Electronic Documents Act*, we reference the findings of the former Privacy Commissioner of Canada in PIPEDA Case Summaries #14 and 15[12]. At issue was whether the prescribing practices information of the aggrieved physician was the "personal information" of that physician and whether it could be collected, used or disclosed without his consent. Mr. Radwanski concluded that the prescribing information was 'work product' and not 'personal information'. That decision of the Commissioner is currently under appeal to the Federal Court Trial Division.

[12] Available online at www.privcom.gc.ca

Work product has been specifically defined in the British Columbia *Personal Information Protection Act* as

> *information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.* [s. 1]

This law has been designed to be substantially similar to PIPEDA.

The comparable law in Alberta is the *Personal Information Protection Act.* We are informed by the Alberta government that it had decided that 'work product' was excluded implicitly by the statutory definition of personal information in section 1(k) and therefore it did not need to be explicitly defined.

In terms of Saskatchewan's FOIP Act, the definition of "personal information" is in section 24. It does not explicitly identify 'work product information'. My view however, and my approach to overseeing the *Freedom of Information and Protection of Privacy Act*, the *Local Authority Freedom of Information and Protection of Privacy Act* and HIPA will be to construe personal information in a way consistent with the approach taken by my colleagues in other jurisdictions, notably Ontario, British Columbia and Alberta and relevant decisions of superior courts in Canada.

I also rely on the decision of the office of the Ontario Information and Privacy Commissioner in Reconsideration Order R-980015.[13] This is an extensive review of what is and is not personal information. The Ontario Commissioner clearly differentiates work product from personal information and confirms only the latter is protected under the Ontario FOIP Act.

I also rely on the Supreme Court of Canada decision in Dagg v. Canada (Minister of Finance).[14] [1997] 2 S.C.R. 403. In this case, sign-in logs for government employees working at the workplace on weekends were not considered "personal information" and consequently were accessible.

I would suggest there are some compelling reasons why "personal information" should not be given such an expansive meaning that it captures work product and in this example, physician prescription practice information. Chief among these would be the goals of accountability and transparency in the provision of public services. Just as the FOIP Act carves out certain employee information from the definition of "personal information" in section 24(2), it is important that HIPA not be construed in such a way as to obstruct accountability of providers of important publicly funded health services.

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[13] Available online at www.ipc.on.ca, pages 3-6 and 7-13

[14] [1997] 2 S.C.R. 403, page 6

There may well be good public policy reasons to limit the sale/collection of prescribing information about Saskatchewan physicians. That is a question for Saskatchewan Health and the Legislative Assembly to consider. Those public policy considerations however should be founded on a principle(s) other than the 'protection of personal information'.

(c) Is it appropriate to include privacy protection for the professional practice information of physicians in a regulation under HIPA?

This office would prefer that health provider information be dealt with in a separate instrument more appropriate than HIPA and its focus on patient information. A more appropriate statute would be one dealing with either physicians or pharmacists and the manner in which they discharge their legal and professional responsibilities.

We note a related Order H2002-003 issued by the Information and Privacy Commissioner of Alberta ("OIPC") on March 19, 2003. This resulted from an own-motion investigation undertaken by the Alberta OIPC. The issue was "*Does the* [Health Information Act ("HIA")] *permit Alberta pharmacists and pharmacies to disclose health services provider information to IMS HEALTH, Canada?* " This Order usefully reviews the types of data at issue and the business practices of IMS. The Commissioner concluded that the disclosure of the physician's first and last name in the context of the 35 data elements collected by IMS is prohibited by HIA unless consent of the physician is obtained prior to disclosure. This decision is now the subject of a judicial review application pending before the Court of Queen's Bench of Alberta.

It is important to note that the decision of my Alberta counterpart is based on a statutory provision unique to the Alberta HIA-an element that does not appear in our HIPA. The Alberta HIA addresses not only personal health information but also captures "health services provider information". It sets out rules for the collection, use and disclosure of health services provider information. The Saskatchewan HIPA does not address "health services provider information" and focuses exclusively on personal health information.

Conclusion on Proposed Amendment #10

For the reasons noted above, in our opinion, health provider information is a discrete, collateral matter independent of 'personal health information'. As such, it ought to be regulated under legislation that generally governs the conduct of Saskatchewan physicians and pharmacists and not under the *Health Information **Protection Act.*** If the proposed regulation under HIPA proceeds, then we are

concerned that other kinds of matters not directly related to personal health information will be included either in HIPA or its regulation. This would tend to 'muddy the waters' and make the HIPA regime more challenging for purposes of implementation than is already the case.

Proposed Regulation #11

Disclosure of registration information for regional health authority and affiliate fundraising.

We have difficulty with Option One (the opt-out consent).

According to internationally recognized Fair Information Practices, or Fair Information Principles, personal information collected by a health region for one purpose, namely obtaining health care services, should not be used or disclosed for other purposes without consent.

Fundraising is clearly an important matter for regional health authorities coping with escalating costs to provide timely, appropriate health care services to all Saskatchewan residents. It is perfectly appropriate for health regions to ask patients whether their registration information can be disclosed to the foundation affiliated with the hospital. If there is no consent, then that person's information should not be shared with the foundation or fundraising organization.

I am not aware of any reliable, documented evidence that most Saskatchewan residents would not give consent for this purpose if asked.

Reference is made in the draft regulation package to the treatment of fundraising in the Ontario *Personal Health Information Protection Act, 2004.*[15] The draft regulations in Ontario propose the following constraints on disclosure for fundraising purposes:

> *1. Personal health information held by a health information custodian may only be collected, used or disclosed for the purpose of fundraising activities undertaken for a charitable or philanthropic purpose related to the custodian's operations.*
>
> *2. Consent under clause 32(1)(b) of the Act may only be inferred where,*
>
> *i. the custodian has at the time of providing service to the individual, posted or made available to the individual a brief statement that unless he or she requests otherwise, his or her name and contact information may be disclosed and used for fundraising purposes on behalf of the custodian, together with information on how the individual can easily opt-out of receiving any future fundraising solicitations on behalf of the custodian, and*
>
> *ii. The individual has not opted out*

[15] Page 20

3. The individual may not be solicited for fundraising purposes relating to the operations of a custodian earlier than 60 days after discharge from a facility operated by the custodian or the provision of health care to the individual by the custodian.

4. All solicitations for fundraising must provide the individual with an easy way to opt out of receiving future solicitations.

5. When contacting or attempting to contact the individual for the purpose of fundraising, the custodian or a person conducting fundraising on its behalf must not reveal any information about the individual's health care or state of health."

Alberta has taken a very different approach by prohibiting the use of personal health information for commercial purposes. Alberta's *Health Information Act* provides as follows:

107(2) No person shall knowingly ...(f) use individually identifying health information to market any service for a commercial purpose or to solicit money unless the individual who is the subject of the health information has specifically consented to its use for that purpose."

The penalty for this offence is a fine of not more than $50,000.

This Alberta provision is consistent with a key recommendation in the *Canada Health Infoway Paths to Better Health- Final Report* as follows:

5.1 In harmonizing and strengthening the protection of personal health information across jurisdictions, governments should ensure that their privacy legislation for health embodies the following mechanisms and principles:...(g) provisions prohibiting all secondary commercial use of personal health information;[16] [emphasis added]

Our office has received complaints from citizens who learned that their personal information had been disclosed by the hospital in which they recently received service to a foundation. In fact, the letter to the former patient was signed by the head of surgery in the hospital. This is troublesome for several reasons. Would an unsophisticated patient receiving such a letter be concerned that their future care might be compromised if he or she elects not to make a contribution to the foundation?

According to Saskatchewan Health, the arguments from Regional Health Authorities are that seeking opt-in consent would not be as effective and would add an administrative cost. Our response is that there should be demonstrable evidence that opt-in consent would not work.

---

[16] Minister of Public Works and Government Services, 1999, p. 5-4

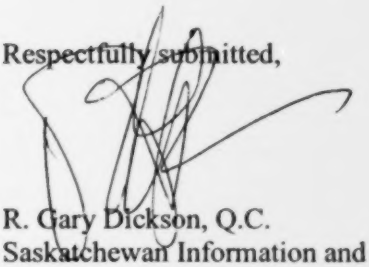
In our view Option Two is preferable. We think that the qualification that consent can only be obtained "at time of discharge from the service" is unduly restrictive. In our view, section 6 adequately addresses what constitutes valid consent.

Conclusion

The publication of the regulations in draft form provides an excellent opportunity for an informed and vigorous public discussion of the rules that should apply to the collection, use and disclosure of personal health information in Saskatchewan.

We hope that this commentary will be useful in the public review of the draft regulations under *The Health Information Protection Act.*

Respectfully submitted,



R. Gary Dickson, Q.C.
Saskatchewan Information and Privacy Commissioner

September 10, 2004

The Health Information Protection Act Regulations

DRAFT for Consultation

Comments may be forwarded to:

HIPA Regulations
Policy and Planning Branch
Saskatchewan Health
3475 Albert Street
Regina SK S4S 6X6
Fax: (306) 787-2974
Email: ppbweb@health.gov.sk.ca

Deadline for comments is **September 30, 2004**

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The Health Information Protection Act (HIPA) became law on September 1, 2003. Since that time trustees have been working towards compliance with the Act thereby ensuring the protection and privacy of personal health information collected, used and disclosed throughout the health system in the province.

Over the past number of months, Saskatchewan Health has been working on the development of a set of proposed regulations under the Act. Saskatchewan Health now wants to provide trustees, other key stakeholders and the public with the opportunity to review the regulations being proposed under HIPA and to provide comments regarding the proposed regulations.

In the following pages you will find the proposed regulations under HIPA. Please provide any comments on the proposed regulations that you may have by **September 30, 2004**. Comments may be forwarded to;

HIPA Regulations
Policy and Planning Branch
Saskatchewan Health
3475 Albert Street
Regina SK S4S 6X6
Fax: (306) 787-2974
Email: ppbweb@health.gov.sk.ca

PROPOSED REGULATION #1

Exempting the Saskatchewan Archives Board from the rules of HIPA where the personal health information collected by the Saskatchewan Archives Board is not from a prescribed trustee under HIPA, where records have been publicly available through the Archives, etc.

Explanation
The Saskatchewan Archives Board is designated as a trustee under HIPA and therefore must comply with the Act. This has proven to be problematic for the Archives Board since part of their mandate is to make records available to the public and to researchers. For example, many records that were available to the public prior to the proclamation of HIPA, have become restricted and can now only be accessed following exhaustive reviews to confirm if any personal health information is contained in the records. This is often the case for non-"health" records including diaries, published documents, etc.

Creating a regulation to address these concerns will assist the Saskatchewan Archives Board in carrying out its mandate while at the same time protecting health records that contain personal health information.

Section 4 of HIPA allows a regulation to be created exempting records collected for certain statutory purposes from Parts II, IV and V of the Act. The following purposes are proposed for exemption:

a) The Saskatchewan Archives Board collects records from individuals and organizations who are not trustees under HIPA. The Board holds records that contain personal health information which have been obtained from individuals, organizations, etc., that were/are not trustees designated under HIPA. These records have been received from individuals who have requested that the Saskatchewan Archives Board keep their records for historical and research purposes by other individuals. They may include, for example, family and community histories, records of community organizations, individual citizens, etc. For a number of years the Saskatchewan Archives Board has routinely entered into contracts with individuals when they receive such records which stipulate the conditions agreed to by the individual with respect to the use and disclosure of their information. For example, the contract may stipulate that personal information contained in the records cannot be released without the consent of the individual for a period of 20 years after which time no further consent is required.

   The intent of regulation (1)(a) is to clearly exempt personal health information collected by the Saskatchewan Archives Board where that information has not been collected from or was not previously in the custody or control o a trustee under HIPA. This regulation would apply to information collected and archived from non-trustees both before and after the proclamation of HIPA.

b) The Saskatchewan Archives Board has historical records collected from government institutions which have been made available to the public by the Archives Board prior to proclamation of HIPA – in some cases for many decades. Generally these records are not health records but may contain incidental personal health information. For example, the Saskatchewan Homestead Records were in part collected from a government institution. They are a well-used and highly valuable collection that focuses on the activity of homesteading in Saskatchewan's pioneer days. However, because the records will sometimes contain a reference to a person's health, the government is concerned that HIPA will greatly reduce the availability of these records. Regulation (1)(b) proposes to exempt records collected from government institutions which were previously available to the public, except where those records are more liable to contain personal health information. Specifically, records from Saskatchewan Health (and its predecessors) or records that clearly are health focused will not be exempt.

c) The Saskatchewan Archives Board also collects records from government institutions where those records were public before being transferred to the Archives. For example, Court records collected for Saskatchewan Justice were public records prior to being collected by Saskatchewan Archives. Regulation (1)(c) is proposed to ensure these records remain public.

Clause 27(4)(p) of HIPA allows regulations to be created that would authorize the disclosure of personal health information in the custody and control of the trustee without the consent of the individual for a particular purpose but only when the trustee believes it is necessary or is important to do so.

Section (2) of the proposed regulation gives the Provincial Archivist some limited authority to disclose records where the individual to whom the information relates is likely to have been dead for more than 30 years, or for research purposes, where the disclosure is in keeping with policies and practices of the Saskatchewan Archives Board, and the Provincial Archivist obtains a written agreement from the person to whom the information is to be disclosed. The ability to disclose records under these conditions allows the Saskatchewan Archives Board to continue to fulfil its mandate.

Proposed Regulation – Draft

(1) For the purposes of clause 4(4)(i) of the Act, Parts II, IV and V of the Act do not apply to personal health information obtained by the Saskatchewan Archives Board for the purposes of *The Archives Act, 2004*:

(a) from a person who is not a trustee;

(b) in records which were made available to the public for research under *The Archives Act* on or before the proclamation of *The Health Information Protection Act* and which were provided by a government institution, other than:

(i) records provided by the Department of Health, Department of Public Health or any predecessor to those departments; or

(ii) records that, by their file description, would reasonably be expected to contain significant amounts of personal health information; and

(c) in records provided by a government institution where the records were published or made available to the public before the records were acquired by the Saskatchewan Archives Board.

(2) For the purposes of clause 27(4)(p) of the Act, personal health information in the possession of the Saskatchewan Archives Board may be disclosed by the Provincial Archivist:

(a) where, in the opinion of the Provincial Archivist, the individual to whom the information relates is likely to have been dead for more than 30 years; or

(b) for research purposes, where the disclosure is in keeping with policies and practices of the Saskatchewan Archives Board, and the Provincial Archivist obtains a written agreement from the person to whom the information is to be disclosed that it

will not be further disclosed in a form which could reasonably be expected to identify the individual to whom the information relates.

PROPOSED REGULATION #2

Retention of records containing personal health information.

Explanation
Section 17 of HIPA allows regulations to be created that would outline the standards to be established with respect to the retention of personal health information. This regulation is intended to accomplish the following:

1. Section (1) proposes definitions for those records that do not typically need to be retained for the default of 6 or 10 years as proposed in the regulations. These definitions include:

   Transitory records are defined as records of temporary usefulness that are not an integral part of the personal health information record, that are not regularly filed with standard records or filing systems, and that are only required for a limited period of time for the completion of a routine action or the preparation of an ongoing record. One example of transitory records would be medical transcription recordings.

   Secondary records are defined as records that were created for a secondary purpose other than the direct care or benefit of the subject individual. One example of a secondary record would be a videotaped operative procedure made for use by the physician for purposes of teaching or self-evaluation.

   Scheduling records are defined as records that are created for the purposes of managing and scheduling subject individuals for health services including log books, daily appointment books, schedules, calendars, patient booking lists. These may be disposed of when no longer required by the trustee as this information is typically created for the short term and is not necessary to be kept for long lengths of time.

2. Section (2) proposes to establish a default retention period of 6 years, or age of majority plus 2 years for minors, which ever is longer, that is applicable to all records containing personal health information, except where otherwise identified in the regulations. In other words, if a record does not fit any of the other retention periods included in this section, the default in subsection 2 applies.

   It should be noted that this is a minimum requirement; trustees could retain records for a longer period if necessary. Records for minors (the age of majority (18 years) plus 2 years) align with the limitation period under tort law. Exceptions are contained in subsections (3), (4), (5) & (6) which follow. The 6-year retention period is a common retention period for many records in government institutions and in the health system.

3. The retention schedules of records held by government institutions are already governed under *The Archives Act*. There is a process in place by which government institutions review their records and determine retention or destruction of their records under these existing sets of rules. Having HIPA apply to parts of these records, could add administrative layers to the disposal of records by government institutions.

   Since the retention schedules under *The Archives Act* are consistent for the most part with the default regulations being proposed under HIPA, it makes good business practice for government institutions to continue to be governed under *The Archives Act*.

   Where *The Archives Act* does not govern records containing personal health information held by government institutions, the retention schedule under HIPA would apply.

   Section (3) of the regulation proposes the retention schedule for government institutions.

4. Subsection (4)(b) proposes to establish a separate retention period specific to regional health authorities and health care organizations that are in keeping with the retention period stated in *The Hospital Standards Regulations*.

   In particular, subsection 4(a) establishes a default that applies to all health region and health care organization records containing personal health information unless otherwise specified in the regulations.

   Preliminary consultations indicated a preference for a simple and single retention period for all health region and health care organization client records. However, there were also suggestions that different retention periods might be appropriate for client files created for different purposes (e.g. acute, mental health, home care, etc.) and held by a health region or health care organization. **Saskatchewan Health would appreciate receiving any additional comments that health regions or health care organizations might have on this matter.**

   It should be noted that this is a minimum requirement; trustees could retain records for a longer period if necessary. Records for minors (the age of majority (18 years) plus 2 years) align with the limitation period under tort law. Exceptions are contained in subsections (5) & (6) which follow. The 10-year retention period is a common retention period for many records held by regional health authorities and health care organizations.

   Subsection 4(b) of the proposed regulation, is consistent with section 85 of *The Hospital Standards Regulations*, but also expands the retention schedule to all

regional health authorities and health care organizations instead of just hospitals. Section 85 of *The Hospital Standards Regulations* states:

> ***85****(1) The board must, in consultation with the medical health officer responsible for the area in which the hospital is located, establish a written policy with respect to employee health and requirements for the clinical testing and immunization of employees for the purpose of protecting patients and hospital personnel against diseases and the transmission of communicable diseases.*
>
> *(2) The policy required by subsection (1) must provide for:*
>
> > *(a) creating and maintaining accurate records of all immunizations, medical examinations and tests carried out pursuant to the policy; and*
> > *(b) retaining the records described in clause (a) with respect to each employee after he or she ceases to be an employee for a period of not less than two years after the cessation of employment.*

These employee records are typically maintained separate from other employee records (e.g. attendance, wage, and classification records) held by a health region or health care organization.

The retention period of 5 years after the termination of the employment of the employee is consistent with the retention of other employee records under *The Labour Standards Act*.

This provision does not apply to health records created if an employee is a patient or client of a health region or health care organization. Those records are treated like any other health record and retained for the time identified in section 2 or subsection 4(a) of this regulation.

5. Section (5) proposes to establish shorter retention periods for records that typically do not need to be retained for the default of 6 or 10 years (e.g. copies of records).

   The retention period in clause (5)(a) acknowledges "identifiable" data collected in databases or in report form (for example, the information captured for submission to the Canadian Institute for Health Information (CIHI) and/or the Department of Health). This retention period does not apply to "de-identified" aggregate (i.e. grouped data where personal health information from which any information that may reasonably be expected to identify an individual has been removed) data or administrative data (i.e. data collected primarily for the administration of programs, for example to pay claims, record transactions) that is not considered personal health information under HIPA. The fact that trustees are capturing the health services number along with other data fields within their data abstract makes the information "identifiable".

6. Section (6) proposes to establish that a trustee is not required to retain additional copies of the same record.

Where a trustee holds more than one record of the same personal health information, the trustee may designate any record as the official record, and for which must be retained for the full retention period. The copies or duplicates of the same record can be disposed of in a secure manner.

Proposed Regulation – Draft
(1) For purposes of this section:

(a) "transitory records" mean records of temporary usefulness that are not an integral part of the personal health information record, that are not regularly filed with standard records or filing systems and that are only required for a limited period of time for the completion of a routine action or the preparation of an ongoing record;

(b) "secondary records" mean records that were created for a secondary purpose other than the direct care or benefit of the subject individual;

(c) "scheduling records" mean records that are created for the purposes of managing and scheduling the delivery of health services to subject individuals.

(2) Subject to subsections (3), (4), (5) and (6) and for the purposes of section 17 of the Act, personal health information contained in records of trustees shall be retained from the date of collection or creation of the record for the longer of:

(a) 6 years; or
(b) the age of majority plus 2 years for a minor;

whichever is longer.

(3) Government institutions defined as trustees under clause 2(t)(i) of *The Health Information Protection Act* shall retain records containing personal health information as governed by *The Archives Act* and the Retention Schedules under that Act.

(4) Subject to subsections (5) and (6), regional health authorities and health care organizations shall retain records containing personal health information for a minimum of the periods listed below:

(a) All patient, client, or resident records shall be retained from the date of collection or creation of the record for the longer of:

(i) 10 years; or
(ii) the age of majority plus 2 years for a minor;

whichever is longer.

(b) Records of immunizations, medical examinations and tests of employees created and maintained by a regional health authority or health care organization for employment purposes must be retained with respect to each employee for a period of not less than 5 years after the cessation of employment.

(5) Trustees that collect or create records containing personal health information for the purposes listed below shall retain them as follows:

(a) In the case of aggregate or statistical records that contain identifiable personal health information, including the health services number, for as long as required by the trustee;

(b) In the case of transitory records containing personal health information, for as long as required by the trustee;

(c) In the case of secondary records containing personal health information, for as long as required by the trustee or as required by other relevant retention schedules;

(d) In the case of scheduling records containing personal health information, for as long as required by the trustee.

(6) Nothing in this section requires a trustee to retain additional copies of the same record.

Other records

If there are other records which should be included, please list them in the following table providing a description of the record, a suggested retention period and comments to explain why the particular retention period is needed. Please only include records that do not fit any of the categories listed above (e.g. client files, transitory records, copies). Records include paper, electronic, microfilm, etc.

Name/Type of Record	Suggested Retention Period	Comments/Explanation

PROPOSED REGULATION #3

Designation of appropriate archives.

Explanation
Section 22 of HIPA allows regulations to be created that would designate the appropriate archives where records containing personal health information may be transferred in cases where:

- a trustee ceases to be a trustee;
- a former trustee fails to carry out their duties under the Act until the records have been transferred to another trustee or to a designated archive; or
- a trustee dies.

Any personal health information held by an agency that is not "active" but does not meet the retention schedule timeline for destruction can be sent to a designated archive for storage until such time as the record either becomes active or the retention schedule is met.

Designated archives will also be used when a trustee ceases to be a trustee.

Responsibility for personal health information remains with the trustee until such time as it is transferred to another trustee or an information management service provider that is a designated archive.

Being designated as an archive does not mean that these organizations are obligated to store personal health information from another trustee.

Proposed Regulation – Draft
(1) For the purposes of Section 22, the following are designated archives:

(a) Saskatchewan Archives Board;

(b) University of Regina Archives;

(c) University of Saskatchewan Archives;

(d) Regional Health Authorities or Affiliates;

(e) the Department of Health;

(f) the Saskatchewan Health Information Network.

(2) Nothing in this regulation requires a designated archive to accept personal health information from a trustee.

PROPOSED REGULATION #4

Disclosure of personal health information without consent for the purpose of professional disciplinary hearings.

Explanation
Clause 27(4)(p) of HIPA allows regulations to be created that would authorize the disclosure of personal health information in the custody and control of the trustee without the consent of the individual for a particular purpose but only when the trustee believes it is necessary or is important to do so.

Current practice by health professional regulatory bodies is to allow personal health information to be used as part of a disciplinary hearing. Disciplinary hearings, like a court of law, are generally open to the public to ensure openness and accountability of the process. At present, personal health information is sometimes disclosed as part of these proceedings.

Health professional regulatory bodies need the ability to disclose for this purpose; however, HIPA does not currently permit it. This regulation would enable this disclosure to happen for this particular purpose.

Proposed Regulation – Draft
(1) For the purposes of clause 27(4)(p) of the Act, personal health information may be disclosed without the consent of the subject individual:

(a) By a regulatory body as defined in section 2 subsection (t)(xiii) of the Act, for the purposes of a public hearing conducted pursuant to an Act with respect to regulating a profession, if:

(i) the hearing relates to allegations of unprofessional conduct or incompetence;

(ii) the disclosure is limited to documents entered into evidence at the hearings, reports prepared as a result of the hearings, or testimony given at the hearings; and

(iii) the regulatory body has established a written policy concerning the disclosure of personal health information and the disclosure is in a manner consistent with that written policy.

PROPOSED REGULATION #5

Disclosure of personal health information without consent regarding condition reports of individuals by a trustee.

Explanation
Clause 27(4)(p) of HIPA allows regulations to be created that would authorize the disclosure of personal health information in the custody and control of the trustee without the consent of the individual for a particular purpose but only when the trustee believes it is necessary or is important to do so.

Several regional health authorities have requested that a regulation be added to enable a very limited disclosure of information pertaining to the individual for use in reports to the media for example. This reflects current practice in many institutions.

Health region and affiliate staff argue that this regulation allows the region/affiliate to act as a buffer between a family and a particular group or organization requesting the information (for example, the media) when the family is mostly concerned with the condition of the patient and not with answering questions from the particular group or organization.

As a general guideline the meaning of the conditions as taken from *The Canadian Press Stylebook* would be as follows:

Good: The pulse, breathing and other vital signs are normal and stable. The patient is comfortable and conscious, and the outlook for recovery is good.

Fair: The pulse, breathing and other vital signs are near normal and the patient is conscious, but he or she is uncomfortable or may have minor complications. The outlook for recovery is favourable.

Serious: The patient is acutely ill and the chance of recovery is uncertain. The pulse, breathing and other vital signs may be abnormal or unstable.

Critical: Death may be imminent. The pulse, breathing and other vital signs are abnormal and unstable and there are major complications.

Proposed Regulation – Draft
(1) For the purposes of clause 27(4)(p) of the Act, personal health information may be disclosed without the consent of the subject individual:

(a) where a person is receiving services in a health facility operated by a regional health authority or affiliate, the regional health authority or affiliate may disclose a condition report about that individual using the following or similar terms:

(i) good;

(ii) fair;
(iii) serious;
(iv) critical;
(v) deceased, once next of kin have been notified;

and, provided the disclosure is not against the expressed wishes of the subject individual.

PROPOSED REGULATION #6

Disclosure of registration information without consent to the Saskatchewan Cancer Agency.

Explanation
Subsection 28(8) of HIPA allows a regulation to be created for the disclosure of registration information without the consent of the individual for a particular purpose.

Recognizing the limitations of *The Freedom of Information and Protection of Privacy Act* in regard to broader health system planning and management needs, HIPA includes expanded provisions to allow sharing of registration information for "planning, delivering, evaluating or monitoring" by regional health authorities, the minister or affiliates.

The Saskatchewan Cancer Agency (or Foundation) was not included in this list under HIPA. However, the Saskatchewan Cancer Foundation has ongoing needs for information from the Person Registry System, for example, to update and maintain the cancer registry.

Given the fact that the Foundation's role in the province's health system, the proposed regulation includes the Saskatchewan Cancer Foundation as one of the bodies with which registration information can be shared under HIPA for "planning, delivering, evaluating or monitoring" of their program.

Proposed Regulation – Draft
(1) For the purpose of clause 28(8) of the Act, registration information may be disclosed without the consent of the subject individual:

(a) by the minister to the Saskatchewan Cancer Foundation for the purpose of verifying the eligibility of an individual to participate in a program of, or receive a service from the Saskatchewan Cancer Foundation:

(i) in the course of processing an application made by or on behalf of the individual; or

(ii) if the individual is already participating in the program or receiving the service;

(b)by the minister to the Saskatchewan Cancer Foundation for the purpose of verifying the accuracy of registration information held by the Saskatchewan Cancer Foundation;

(c)for the purposes of planning, delivering, evaluating or monitoring a program of the Saskatchewan Cancer Foundation that relates to the provision of health services or payment for health services:

(i) by the minister to the Saskatchewan Cancer Foundation;

(ii) by the Saskatchewan Cancer Foundation to the minister;

(iii) by the Saskatchewan Cancer Foundation to a regional health authority or affiliate; or

(iv) by a region health authority or affiliate to the Saskatchewan Cancer Foundation.

PROPOSED REGULATION #7

Disclosure of registration information without consent to ambulance operators for the purpose of obtaining payment for services provided to an individual.

Explanation
Subsection 28(8) of HIPA allows a regulation to be created for the disclosure of registration information without the consent of the individual for a particular purpose.

Ambulance operators require sufficient identifying information on an individual that they transport to a hospital or other health facility for purposes of billing that individual for the ambulance service. It is sometimes the case that the individual is not in a condition to provide this identifying information to them; therefore, they often request this information from the hospital, other health facility or the Department of Health. HIPA currently does not permit this to happen.

This proposed regulation enables the disclosure of registration information without the consent of the individual to happen in a very limited circumstance and only after an ambulance operator has made an attempt to collect the information from the individual.

Proposed Regulation – Draft
(1) For the purpose of clause 28(8) of the Act, registration information may be disclosed without the consent of the subject individual:

(a) by a regional health authority or an affiliate where the registration information is disclosed to an ambulance operator to assist the ambulance operator in obtaining payment for services that have been recently been provided to the subject individual;

(b) where the disclosure of registration information is limited to the name, address and telephone number of the subject individual and where the regional health authority or affiliate has that information; and

(c) where it is not possible for the ambulance operator to collect the relevant information from the individual.

PROPOSED REGULATION #8

Disclosure of registration information without consent to the Department of Learning for the purpose of administering the Student Tracking Program.

Explanation
Subsection 28(8) of HIPA allows a regulation to be created for the disclosure of registration information without the consent of the individual for a particular purpose.

In response to the concerns raised about the number of children who are not registered in school, or who are registered but not attending, the Department of Learning has been directed by the Government to expand its Student Records System and begin tracking children's attendance at school for the purpose of not only determining how many students are in school, but to also help understand why students are not attending so that appropriate measures can be taken to ensure students are in school or in an approved education program with access to quality education.

Meeting individual students' needs and taking appropriate measures to ensure students are in school is a shared responsibility between local education authorities, the Departments of Learning, Social Services, Health, and Justice, and other provincial organizations. A provincial student tracking system can assist the education system and its partners in planning for the educational success of students and addressing their individual needs.

In order to locate many children living in the province, the Department of Learning requires limited registration information from Saskatchewan Health's Person Registry System (PRS) on school-aged youth who are 7 to 15 years of age. This information will be matched against the information held by Learning to identify children living in Saskatchewan but not attending school.

The use of registration information from the PRS is essential since it provides the most current and comprehensive information on individuals residing in Saskatchewan. And disclosure of this information will clearly benefit the individual and is directly related to

the social well being of the individual not only from an education perspective but also from a health, social welfare and employment perspective.

The proposed regulation allows the disclosure of registration information without the consent of the individual to the Department of Learning for the specific purpose of delivering the student-tracking program. Registration information being disclosed is limited to only that information which Learning needs to know to deliver the program.

Proposed Regulation – Draft
(1) For the purpose of clause 28(8) of the Act, registration information may be disclosed without the consent of the subject individual:

(a) by the Department of Health to an employee of the Department of Learning within the meaning of *The Education Act, 1995* for the purpose of administering a database for the tracking of school-aged youth residing in the province who may or may not be registered in an approved education program; and

(b) that the registration information disclosed will consist of the names, gender, date of birth, telephone numbers and addresses of individuals aged 7 to 15 years inclusive.

PROPOSED REGULATION #9

Fees that can be charged for providing access to records containing personal health information.

Explanation
Section 39 of HIPA allows for the creation of a regulation to establish fees that can be charged by trustees for providing access to records containing personal health information to an individual. The regulation is intended to enable the trustee enough flexibility to recover costs associated with providing access while still establishing a ceiling to keep fees reasonable.

The Act allows but does not require a trustee to collect fees associated with providing access to information or records.

This is intended to enable the trustee to recover costs associated with providing the access.

Proposed Regulation – Draft
(1) Where access to a record or part of a record is provided pursuant to Part V of the Act, a trustee may charge:

(a) a flat fee not to exceed $25.00, or

(b) where time in excess of 30 minutes is spent in searching for a record requested by an individual or in preparing it for disclosure, a fee of $15 for each half-hour or portion of a half-hour of that excess time and is payable at the time when access is given.

(2) In addition to the fees charged in subsection (1), a trustee may charge the following fees:

(a) where a trustee incurs additional costs in providing access to the records or in providing professional consultation in regard to information contained within the records, the trustee may charge fees equal to the actual costs incurred by the trustee;

(b) where access to a record or part of a record is given by providing the applicant with a copy of the record, the following fees are payable at the time when access is given:

(i) for a photocopy, $0.25 per page;
(ii) for a computer printout, $0.25 per page;
(iii) for a paper print from microfilm, $0.50 per page;
(iv) for a form of record not mentioned in clauses (i) to (iii), the actual cost of copying the record.

(3) Where the anticipated fees are expected to be greater than or equal to $100.00, the trustee must provide the individual with an estimate of cost prior to processing the request.

(4) The trustee must take reasonable steps to inform the individual of the estimated fee.

PROPOSED REGULATION #10

Preventing the disclosure of provider information by trustees (i.e. pharmacists).

Explanation
Section 57 of HIPA allows for the creation of a regulation regarding the use or disclosure of information about a trustee or the activities of a trustee where the information is collected in conjunction with the collection of personal health information.

The development of a regulation under HIPA will protect the privacy of prescribing information by preventing Saskatchewan pharmacies from disclosing information about another trustee (e.g. physician) that is collected by pharmacies along with personal health information about an individual. Pharmacies will only be able to disclose information about another trustee (e.g. physician) for a purpose that is consistent with the reason the information was initially collected.

Proposed Regulation – Draft
(1) In these regulations:

(a)"Act" means *The Health Information Protection Act*;

(b) "Information" means information that can be used to identify another trustee that is collected in conjunction with the collection of personal health information about an individual and includes:

(i) a provider-identifier number;

(ii) name, address, etc. of the provider.

(2) These regulations are made for the purposes of section 57 of the Act.

(3) These regulations apply to:

(a) a trustee who either controls the operation of a proprietary pharmacy or a publicly operated pharmacy within the meaning of *The Pharmacy Act, 1996*; and

(b) a trustee within the meaning of subsection 4(a) who no longer controls the operation of a proprietary pharmacy or a publicly operated pharmacy but who has information in his or her possession or control.

(4) Unless otherwise authorized by the Act, no person to whom these regulations apply shall disclose information except where disclosure is for a purpose consistent with the reason the information was initially collected.

(5) These regulations do not apply to statistical or de-identified information where the provider cannot be reasonably identified.

PROPOSED REGULATION #11

Disclosure of registration information for regional health authority and affiliate fundraising.

Explanation
A number of health regions and/or hospital foundations in Saskatchewan have historically contacted patients to ask for donations.

Use of patient lists for fundraising is not among the acceptable reasons for use or disclosure of personal health information under HIPA. A trustee under HIPA can only use and disclose personal health information with respect to an individual for fundraising purposes with the consent of the individual.

Saskatchewan Health has received requests to consider the use and disclosure of registration information by regional health authorities, affiliates and hospital/ health foundations for the purpose of contacting discharged patients to ask for donations. The argument is that patient lists are the best way to raise funds for hospitals and other health facilities and that requirement to obtain consent would not be as effective but would also add an administrative cost to the process.

Two separate regulations are proposed below as options for addressing this issue.

Option One

This regulation allows a health region or affiliate to use registration information to conduct its own fundraising (e.g. mail to the client directly from the health region). It would also allow a health region or affiliate to disclose limited registration information to an affiliated hospital (or other) foundation so that the foundation could contact the client directly. This regulation also attaches conditions to the disclosure.

This regulation would:

- allow use or disclosure of name and address for fundraising based on an implied consent;
- require regional health authorities or an affiliate to inform individuals of their intent to use their names and addresses to fundraise;
- provide individuals with the ability to "opt-out" and have their names and addresses removed from mail outs.

For your information the Ontario government has recently passed Bill 31: *The Health Information Protection Act, 2003* which has a similar provision to the one being proposed here.

Option Two

This option requires an express consent. Furthermore, it requires that the consent not be collected before a service is provided when it might be viewed as a condition for receiving a service.

Proposed Regulation – Draft

Option One

(1) For the purpose of clause 28(8) of the Act, and subject to subsections (2), (3), (4) and (5), registration information may be used or disclosed with implied consent of the subject individual by a regional health authority or affiliate for fundraising purposes provided:

(a) the purposes of the use or disclosure is to support the health services provided by the regional health authority or affiliate; and

(b)the registration information is limited to name, address and date of discharge of individuals who have received services from the regional health authority or affiliate.

(2) When using or disclosing names for the purposes of subsection (1), the regional health authority or affiliate shall take reasonable steps to exclude names of individuals that received services that in the opinion of the trustee the disclosure of which could be considered an unreasonable invasion of the privacy of the individual.

(3) When there is a reasonable expectation that an individual's name, address and date of discharge will be used or disclosed for the purposes of subsection (1), the regional health authority or affiliate must take reasonable steps to inform the individual about the anticipated use at the time when the information is being collected.

(4) Where a disclosure is made in accordance with this section, it must only be to a registered member of the Hospital Foundations of Saskatchewan and/or the Association for Healthcare Philanthropy in Canada.

(5) A trustee can disclose registration information to a person or body described in subsection (4) except where the individual requires that the registration information not be disclosed.

(6) A trustee disclosing registration information to a person or body described in subsection (4) and for the purposes of this section must enter into an agreement with the recipient that requires the recipient to only use or disclose the information for the purpose it was given and not to use or disclosure the information for any other purpose.

Option Two

(1) For the purpose of clause 28(8) of the Act registration information may be used or disclosed by a regional health authority or affiliate for fundraising purposes provided:

(a) the purposes of the use or disclosure is to support the health services provided by the regional health authority or affiliate; and

(b) the regional health authority or affiliate obtains expressed consent from the subject individual at time of discharge from the service.